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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-843

EXXON CORPORATION, APPELLANT,

versus

SOUTH CAROLINA TAX COMMISSION, APPELLEE

ON APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA

MOTION TO DISMISS AND/OR AFFIRM

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The Appellee, pursuant to Rule 16 of the Rules of this Honorable Court, respectfully moves that the appeal herein made from the Order of the Supreme Court of the State of South Carolina be dismissed because the said appeal does not present a substantial federal question, or in the alternative, that the Order be affirmed because the disposition of the issue is settled by existing decisions of this Honorable Court, or because the decision of the Supreme Court of South Carolina is fully supported by the record.

I

ARGUMENT

MOTION TO DISMISS

No substantial Federal question is presented.

The Court is asked to take jurisdiction of this case upon the grounds that South Carolina Code §§ 12-7-250 and 12-7-1130 are repugnant to the Constitution of the United States. Three questions are presented alleging the two sections to be unconstitutional because the same contravene the Due Process Clause of the Fourteenth Amendment and the Commerce Clause of the United States Constitution.

Neither the Jurisdictional Statement nor the questions, however, place in issue the concurrent factual findings of the Supreme Court of South Carolina and the Court of Common Pleas of Richland County. The facts thus found by the South Carolina Courts and not here contested should be binding. Both South Carolina courts found that the Appellant during the years involved conducted a unitary business and that its apportioned income from the unitary business was subject to taxation by the State. This was the substantive holding of those courts and, as stated, such is not placed in issue by the Jurisdictional Statement or the three questions.

If error was committed by the courts, which is assuredly denied, the same would be that of finding from the facts presented that the Appellant conducted a unitary business with the Exploration and Production of crude oil related thereto.

By reason of the Jurisdictional Statement and questions, the only issue thus before this Court is whether the South Carolina statute that imposes an income tax on a unitary business conducted within and without the State upon an income base that represents the proportion of the

trade or business carried on within the State conflicts with the requirements of due process or burdens interstate commerce. Obviously, the sections do not. The tax is apportioned by use of the three factor formula. The Appellant acknowledges that the formula reasonably apportions the income.

In its argument that substantial federal questions are presented, the Appellant states that it does not raise the question of the right of the State to tax income from a multistate business or the applicability of the apportionment formula. The appellant more importantly admits that it does not question the "(3) validity of the three factor formula of South Carolina when properly applied." (See page 13 of the Jurisdictional Statement.) Whether it has been properly applied must of necessity be determined upon the findings of facts but these findings of facts are not in issue. Here, neither the statement nor the questions dispute the fact that the Appellant conducts a unitary business. The fact that a segment of this unitary business is conducted without the State does not preclude the inclusion of the income attributed to that activity in apportionable income.

The Appellant thus prosecutes this appeal for this Court to review and reconsider the facts and find from the evidence presented that income attributable to its Exploration and Production of crude oil is unrelated and a separate business activity from its refining and marketing of petroleum products. It has failed, however, to raise this issue.

Added support for the above is evidenced by the "substantial concepts" asserted in the statement. The Appellant first contends that a corporate entity cannot be found to be unitary based only upon an examination of the corporation's management structure and the nondelineation publicly of its separate operational functions; the second contention is that of whether situs income can also be included

in apportioned income and, finally, it is contended that multiple taxation as a burden on commerce depends on the fact, rather than the power of a situs state to tax.

The first contention is without factual support. Clearly, the decisions of the South Carolina courts were not based or predicated upon such a limited factual consideration. The record is substantial and clearly reflects a full consideration of all of the Appellant's business activities. There were thirty-eight pages of admission, six depositions with 350 pages of testimony, a transcript of 689 pages and the exhibits considered by the Court (Appendix B, App. 24 of the statement). These facts standing alone negate the Appellant's assertions that only the corporate structure was considered. The facts set forth in both Orders establish beyond doubt that the courts' holdings were predicated on all the evidence, including the relationship of the various so-called functional operations.

With reference to the other two contentions, it appears well settled that South Carolina is not precluded from taxing income from business activities just because some other state may be taxing the business activity within that state. It has long been settled that the states are free to employ the unitary business standard. *Underwood Typewriter Co. v. Chamberlain,* 254 U. S. 113, 41 S. Ct. 45, 65 L. Ed. 165; *United States Steel Corp. v. Multistate Tax Commission,* 98 S. Ct. 799.

The rule is that the Appellant must factually prove that the South Carolina statutes discriminately subject its income to taxation. This Court again recognized in *Moorman Mfg. Co. v. Bair,* 98 S. Ct. 2340, that no uniform system for apportioning income exists; that such possibly results in multiple taxation, however, the same was insufficient to invalidate the state law. Here the Appellant has shown no

evidence that more than 100% of its income is taxed by the taxing authorities in which it does business.

In the case of *Johns-Manville Products Corp. v. Commissioner of Revenue Administration,* 115 N. H. 428, 343 A. 2d 221, the court was confronted with a similar question. In that case the income from the sale of timberland in Mississippi was subject to taxation by Mississippi and the gain was also included in apportionable income in New Hampshire. It was argued that this was unlawful because of multiple taxation. The Supreme Court of New Hampshire held that:

> "Plaintiff argues further that since Mississippi has taxed the entire gain, the decision of the board will result in multiple taxation. Even if this were a valid objection (*Illinois Cent. R. Co. v. Minnesota,* 309 U. S. 157 (1940); *State Tax Comm'n. v. Aldrich,* 316 U. S. 174 (1942); *Northwestern States Portland Cement Co. v. Minnesota,* 358 U. S. 450 (1959); *General Motors Corp. v. Washington,* 377 U. S. 435 (1964), plaintiff's complaint should not be directed against New Hampshire whose tax is fairly apportioned and constitutionally proper."

An appeal of that decision to this Honorable Court was dismissed for "want of a substantial federal question". 423 U. S. 1069, 47 L. Ed. 2d 79, 96 S. Ct. 851.

No difference exists between that case and the present case. The fact that some other state may have taxed the income that the Appellant allocates to its Exploration and Production activity is no bar to South Carolina including that income in its apportionment formula. The South Carolina tax is apportioned by a formula that the Appellant admits to be reasonable and is not in issue. The record clearly establishes that no substantial federal question is in issue.

CONCLUSION

No substantial federal question exists in this action. It is not unlawful to properly apportion the income of a unitary business and to include therein that income that is attributable to the out-of-state activity. The Appellant's effort to convert the factual findings into a declaration of the unconstitutionality of the South Carolina statutes must fail. We respectfully submit that the appeal should be dismissed.

II

ARGUMENT

MOTION TO AFFIRM

The decision of the South Carolina Supreme Court should be affirmed in that the same is abundantly supported by the record and is in conformity with the decisions of this Honorable Court.

The Appellant admittedly is engaged in the business of marketing petroleum products. Its activities consist of finding and producing crude oil, the refining of such crude and the sale of the petroleum products to its customers. It is this last transaction from which the income was earned. This Court in the case of *Bass, Ratcliff & Gretton, Ltd. v. State Tax Commission,* 266 U. S. 271, 45 S. Ct. 82, was confronted with the taxation of a manufacturer of ale. The ale was brewed in England and imported and sold through branch offices located in New York City and Chicago. The question was whether the inclusion of the income from the activity in England burdened foreign commerce. The Court held:

> "So in the present case we are of opinion that as the Company carried on the unitary business of manufacturing and selling ale, in which its profits were earned by a series of transactions beginning with the manufacture in England and ending in sales in New York and other places—**the process of manufacturing resulting in no profits until it ends in sales**—the State was justified in attributing to New York a just proportion of profits earned by the Company from such unitary business." (Emphasis added.)

The Appellant states that its Exploration and Production is separate and unrelated to its refining and marketing activity. Such contention was discarded, however, by the South Carolina courts. We submit that the record sustains the holdings of the South Carolina Courts and that the Appellant's contention is without factual support. Much is said about accounting, however, we would ask the question of when did accounting and form take precedent over substance in tax matters. Substance, not form, has long controlled the disposition of tax questions.

For a support of the above, the Court's attention is called to the factual findings set forth in the Order of the Court of Common Pleas of Richland County (Appendix B) and the Order of the Supreme Court of South Carolina (Appendix A). The Appellant allocated the majority of its income to Exploration and Production, about 90%, with 4% and 7% allocated to refining and marketing (Appendix B, App. 29 of the statement).

At this point it should be noted that the Appellant's production of crude was transferred to its supply department and then refined or sold to others. Significance must also be given to the fact that the Appellant refined approximately 1,000,000 barrels of crude per day and produced about 800,000 barrels of that amount (Appendix B, App. 20 of the statement).

Also of importance is the fact that the income attributable to all of the functions entered into one company treasury. The alleged income from Exploration and Production was used by the company to build refineries, to make other

investments and to pay ordinary corporate expenses, such as salaries.

These facts clearly sustain the factual holding of the South Carolina courts that the Appellant conducted a unitary business.

It should also be noted that the Appellant alleges that it produces its crude, sells the same to its supply department, that then sells to its refining department, that then sells to its marketing department. How is it possible for the Appellant to sell itself something it already owns or how can it transfer something to itself that is in its possession? Strong reliance is made upon posted field prices, however, these are prices that the Appellant sets. In other words, it says we will pay ourselves so much for the crude. Admittedly, some crude is sold to others, however, this is a matter of convenience and where is the evidence to establish such sales in comparison to total production. Additionally, the availability of crude was dependent upon production (Appendix B, App. 28).

Before concluding argument on this motion, attention is called to the settled law of this Honorable Court that sustains the right of the states to tax the income of the Appellant's unitary business. *Moorman Mfg. Co. v. Bair,* 98 S. Ct. 2340, is the latest consideration of the issue.

The tax is not an unapportioned tax that by its nature subjects interstate commerce to an unfair burden. In the case of *N. W. States Portland Cement Co. v. State of Minn.,* 358 U. S. 464, 795 S. Ct. 357, the court held:

> "This is not an unapportioned tax which by its very nature makes interstate commerce bear more than its fair share. As was said in *Central Greyhound Lines of New York v. Mealey,* 1948, 334 U. S. 653, 661, 68 S. Ct. 1260, 1265, 92 L. Ed. 1633, 'it is interstate commerce which the State is seeking to reach and * * * the real question [is] whether what the State is exacting is a

> constitutionally fair demand by the State for that aspect of the interstate commerce to which the State bears a special relation.' The apportioned tax is designed to meet this very requirement and 'to prevent the levying of such taxes as will discriminate against or prohibit the interstate activities or will place the interstate commerce at a disadvantage relative to local commerce.' *Id.,* 334 U. S. at page 670, 68 S. Ct. at page 1270. Logically it is impossible, when the tax is fairly apportioned, to have the same income tax twice. In practical operation, however, apportionment formulas being what they are, the possibility of the contrary is not foreclosed, especially by levies in domiciliary States. But that question is not before us. It was argued in *Northwest Airlines v. State of Minnesota,* 1944, 322 U. S. 292, 64 S. Ct. 950, 952, 88 L. Ed. 1283, that the taxation of the entire fleet of its airplanes in that State would result in multiple taxation since other States levied taxes on some proportion of the full value thereof. The Court rejected this contention as being 'not now before us' even though other States actually collected property taxes for the same year from Northwest upon 'some proportion' of the full value of its fleet. Here the records are all to the contrary. There is nothing to show that multiple taxation is present. We cannot deal in abstractions. In this type of case the taxpayers must show that the formula places a burden upon interstate commerce in a constitutional sense. This they have failed to do."

The Appellant has failed to establish an unfair burden. The South Carolina Supreme Court in its Order stated:

> "Turning to the question of multiple taxation and the Commerce Clause, the prevention of double taxation is, of course, the whole reason for apportioning income. During the years in question, the South Carolina three factor formula allocated 1.0%, 1.1% and 1.2% of Humble's overall income to this State. The record does not disclose what portion of Humble's income was taxed by all states combined. If, in fact, Humble paid income

taxes on more than one hundred (100%) percent of its income to all states combined, it has not attempted to prove that fact. See *Covington Fabrics, supra.* Humble has, however, introduced into evidence foreign laws from a number of states which levy extractions known generally as severance taxes. These taxes are not income taxes, they are privilege taxes. For example, the Texas severance tax is described as an 'occupation tax on oil produced measured by number of barrels of oil taken'. See *State v. Humphrey,* 159 S. W. 2d 162 (1942). It has been settled law for many years that it is not multiple taxation to levy taxes on different incidents, for example, a single taxpayer may pay property taxes, privilege taxes and income taxes and not be subject to multiple taxation. Humble has shown no multiple burden." (Appendix A, p. 14.)

The above negate the Appellant's assertion of the unconstitutionality of the South Carolina statutes.

CONCLUSION

The evidence conclusively establishes the correctness of the decision of the South Carolina Supreme Court. It is supported by fact and judicial declaration of this Honorable Court and the Order should be affirmed.

Respectfully submitted,

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